JACOB MATHEW A

v.

STATE OF PUNJAB & ANOR

SUPREME COURT OF INDIA B
RC LAHOTI (CJI)
GP MATHUR
PK BALASUBRAMANYAN
[CRIMINAL APPEAL NO. 144-145-2004]
5 AUGUST 2005 C

CRIMINAL PROCEDURE: *Negligence - Criminal and civil, distinction between - Professional negligence - Inference of rashness or negligence on the part of a professional - Whether additional conditions apply - Medical negligence - Test for determining medical negligence - Bolam's case - Dr Suresh Gupta v Govt of NCT of Delhi & Anor - Principles - Whether agreed and reaffirmed - Whether accused appellant could not be proceeded against under s. 304A of the Indian Penal Code* D

The respondent no. 2 herein filed a first information report ('FIR') with the police station whereupon an offence under s.304A read with s. 34 of the Indian Penal Code ('IPC') was registered. The gist of the information was that on 15 February 1995, the informant's father, the late Jiwan Lal Sharma was admitted as a patient in a private ward of CMC Hospital, Ludhiana. On 22 February 1995, at about 11pm, Jiwan Lal felt difficulty in breathing. The complainant's elder brother, one Vijay Sharma, who was present in the room, contacted the duty nurse who called some doctor to attend the patient. After about twenty to twenty five minutes, Dr Jacob Mathew, the appellant herein, and Dr Allen Joseph came to the patient's room. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The oxygen cylinder was found to be empty and there was no other available gas cylinder in the room. Vijay Sharma went to the adjoining room and brought a gas cylinder therefrom. However there was no arrangement to make the gas cylinder functional and in between, five to seven minutes were wasted. By this time, another doctor came and declared that the patient was dead. On the above said report, an offence under s. 304A/34 IPC was registered and investigated. Challan was filed against the two doctors. The Judicial Magistrate First Class, Ludhiana, framed charges under E F G H I

A s. 304 IPC against the two accused persons. Both of them filed a revision in the court of Sessions Judge submitting that there was no ground for framing charges against them. The revision was dismissed. The appellant filed a petition in the High Court under s. 482 of the Code of Criminal Procedure praying for quashing of
B the FIR and all the subsequent proceedings.

It was submitted before the High Court that there was no specific allegation of any act of omission or commission against the accused persons in the entire plethora of documents comprising
C the challan papers filed by the police against them. The judge who heard the petition formed an opinion that the plea raised by the appellant was available to be urged in defence at the trial and, therefore, a case for quashing the charge was not made out. *Vide* order dated 18 December 2002, the High Court dismissed the
D petition. An application for recalling the abovesaid order was moved which too was dismissed on 24 January 2003. Feeling aggrieved by these two orders, the appellant has filed these appeals by special leave. According to the appellant, the deceased was suffering from cancer in an advanced stage and was required
E to be kept at home and given proper nursing. Nevertheless, every conceivable effort was made by all the attending staff comprising of doctors and nurses and other para-medicals to give appropriate medical treatment to the deceased. The complainant and his relations, who were misguided or were under mistaken belief as to
F the facts, had lodged a police report against the accused persons – wholly unwarranted and uncalled for. The matter came up for hearing before a Bench of two judges of this court. Reliance was placed by the appellant on a recent two-judge bench decision in *Dr Suresh Gupta v. Govt of NCT of Delhi & Anor* [2004] (6) SCC
G 422. The bench hearing this appeal doubted the correctness of the view taken in *Dr Suresh Gupta*'s case and *vide* order dated 9 September 2004 expressed the opinion that the matter called for consideration by a bench of three judges.

H As the question of medical negligence arose for consideration, notice was issued to the Medical Council of India to assist the court at the time of hearing. In addition, a registered society, People For Better Treatment, Kolkata; Delhi Medical Council, Delhi Medical Association and Indian Medical Association sought
I for intervention at the hearing as the issue arising for decision was of vital significance for the medical profession. Mainly, the submissions made by the counsel for the parties and the intervenors have centred around two issues: (i) is there a

difference in civil and criminal law on the concept of negligence; and (ii) whether a different standard is applicable for recording a finding of negligence when a professional, in particular a doctor, is to be held guilty of negligence.

Held (allowing the appeals):

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty,' 'breach' and 'resulting damage.' (para 53)

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of the trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used. (para 53)

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It was not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. (para 53)

(4) The test for determining medical negligence as laid down in *Bolam's* case holds good in its applicability in India. (para 53)

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher *ie*, gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution. (para 53)

(6) The word 'gross' has not been used in s. 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross.' The expression 'rash or negligent' act as occurring in s. 304A of the IPC has to be read as qualified by the word 'grossly.' (para 53)

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent. (para 53)

(8) *Res ipsa loquitor* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It could not be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitor* has, if at all, a limited application in trial on a charge of criminal negligence. (para 53)

(9) In view of the principles laid down hereinabove and the preceding discussion, the principles of law laid down in *Dr Suresh Gupta*'s case was agreed with and reaffirmed the same. (para 54)

(10) All the averments made in the complaint, even if held to be proved, did not make out a case of criminal rashness or negligence on the part of the accused appellant. It was not the case of the complainant that the accused appellant was not a doctor qualified to treat the patient whom he agreed to treat. It was a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably, the hospital may be liable in civil law (or may not be) but the accused appellant could not be proceeded against under s. 304A IPC on the parameters of *Bolam*'s test. (para 58)

[Prosecution of the accused appellant under s. 304A/34 IPC quashed.]

Case(s) referred to:

Achutrao Haribhau Khodwa & Ors v. State of Maharashtra & Ors [1996] (2) SCC 634 ***(refd)***

Andrews v. Director of Public Prosecutions [1937] AC 576 ***(refd)***

Bhalchandra Waman Pathe v. State of Maharashtra [1968] Mh LJ 423 ***(refd)***

Bolam v. Friern Hospital Management Committee [1957] (1) WLR 582 ***(refd)***

Dr Laxman Balkrishna Joshi v. Dr Trimbak Bapu Godbole & Anor [1969] (1) SCR 206 ***(refd)***

Dr Suresh Gupta v. Govt of NCT of Delhi & Anor [2004] (6) SCC 422 ***(refd)***

Eckersley v. Binnie [1988] (18) CLR 1 ***(refd)***

Emperor v. Omkar Rampratap 4 Bom LR 679 ***(refd)***

Hucks v. Cole [1968] (118) New LJ 469 ***(refd)***

Hunter v. Hanley [1955] SLT 213 ***(refd)***

A *Indian Medical Association v. VP Shantha & Ors [1995] (6) SCC 651* ***(refd)***
John Oni Akerele v. The King [1943] AIR (PC) 72 ***(refd)***
Juggankhan v. The State of Madhya Pradesh [1965] (1) SCR 14 ***(refd)***
Kishan Chand & Anor v. The State of Haryana [1970] (3) SCC 904 ***(refd)***
B *Krishnan and Anor v. State of Kerala [1996] (10) SCC 508* ***(refd)***
Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra [1965] (2) SCR 622 ***(refd)***
Maynard v. West Midlands Regional Health Authority [1985] (1) All ER 635 ***(refd)***
Michael Hyde and Associates v. JD Williams & Co Ltd [2001] PNLR 233
C ***(refd)***
M/s Spring Meadows Hospital & Anor v. Harjol Ahluwalia through KS Ahluwalia & Anor [1998] (4) SCC 39 ***(refd)***
Poonam Verma v. Ashwin Patel & Ors [1996] (4) SCC 332 ***(refd)***
R v. Caldwell [1981] (1) All ER 961 ***(refd)***
D *R v. Lawrence [1981] (1) All ER 974* ***(refd)***
Reg v. Idu Beg 1881 (3) All 776 ***(refd)***
State of Haryana & Ors v. Smt Santra [2000] (5) SCC 182 ***(refd)***
Syad Akbar v. State of Karnataka [1980] (1) SCC 30 ***(refd)***
Whitehouse & Jorden [1981] (1) All ER 267 ***(refd)***

E **Legislation referred to:**
Criminal Procedure Code [Ind], s. 482
Penal Code [Ind], ss. 34, 88, 92, 93, 302, 304A, 336, 337, 338

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 30, para 35
F Ratanlal & Dhirajlal, *Law of Torts,* 24th edn, 2002, pp 441-442

JUDGMENT

G **RC Lahoti (CJI):**

[1] Ashok Kumar Sharma, the respondent no. 2 herein, filed a First Information Report with police station, Division No. 3, Ludhiana, whereupon an offence under s. 304A read with s. 34
H of the Indian Penal Code (for short "the IPC") was registered. The gist of the information is that on 15 February 1995, the informant's father, late Jiwan Lal Sharma was admitted as a patient in a private ward of CMC Hospital, Ludhiana. On 22 February 1995 at about 11pm, Jiwan Lal felt difficulty in breathing. The
I complainant's elder brother, Vijay Sharma who was present in the room contacted the duty nurse, who in her turn called some doctor to attend to the patient. No doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew, the appellant before

us and Dr. Allen Joseph came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in the bed. The oxygen cylinder was found to be empty. There was no other gas cylinder available in the room. Vijay Sharma went to the adjoining room and brought a gas cylinder therefrom. However, there was no arrangement to make the gas cylinder functional and in-between, 5 to 7 minutes were wasted. By this time, another doctor came who declared that the patient was dead. The latter part of the FIR states (as per the translation in English as filed by the complainant):

> ... the death of my father was occurred due to the carelessness of doctors and nurses and non availability of oxygen cylinder and the empty cylinder was fixed on the mouth of my father and his breathing was totally stopped hence my father died. I sent the dead body of my father to my village for last cremation and for information I have come to you. Suitable action be done Sd/-
>
> As per statement of intimator the death of Jiwan Lal Sharma has occurred due to carelessness of doctors and nurses concerned and to fit empty gas cylinder.

[2] On the above said report, an offence under s. 304A/34 IPC was registered and investigated. Challan was filed against the two doctors.

[3] The Judicial Magistrate First Class, Ludhiana framed charges under s. 304A, IPC against the two accused persons, both doctors. Both of them filed a revision in the Court of Sessions Judge submitting that there was no ground for framing charges against them. The revision was dismissed. The appellant filed a petition in the High Court under s. 482 of the Code of Criminal Procedure praying for quashing of the FIR and all the subsequent proceedings.

[4] It was submitted before the High Court that there was no specific allegation of any act of omission or commission against the accused persons in the entire plethora of documents comprising the challan papers filed by the police against them. The learned single judge who heard the petition formed an opinion that the plea raised by the appellant was available to be urged in defence at the trial and, therefore, a case for quashing the charge was not made out. *Vide* order dated 18 December 2002, the High Court dismissed the petition. An application for recalling the abovesaid

order was moved which too was dismissed on 24 January 2003. Feeling aggrieved by these two orders, the appellant has filed these appeals by special leave.

[5] According to the appellant, the deceased Jiwan Lal was suffering from cancer in an advanced stage and as per the information available, he was, in fact, not being admitted by any hospital in the country because his being a case of cancer at terminal stage. He was only required to be kept at home and given proper nursing, food, care and solace coupled with prayers. But as is apparent from the records, his sons are very influential persons occupying important positions in Government. They requested the hospital authorities that come what may, even on compassionate grounds their father may be admitted in the hospital for regulated medical treatment and proper management of diet. It was abundantly made clear to the informant and his other relations who had accompanied the deceased that the disease was of such a nature and had attained such gravity, that peace and solace could only be got at home. But the complainant could prevail over the doctors and hospital management and got the deceased admitted as an in-patient. Nevertheless, the patient was treated with utmost care and caution and given all the required medical assistance by the doctors and para-medical staff. Every conceivable effort was made by all the attending staff comprising of doctors and nurses and other para-medicals to give appropriate medical treatment and the whole staff danced attendance on the patient but what was ordained to happen, did happen. The complainant and his relations, who were misguided or were under mistaken belief as to the facts, lodged police report against the accused persons – wholly unwarranted and uncalled for.

[6] The matter came up for hearing before a bench of two learned judges of this court. Reliance was placed by the appellant on a recent two-judge bench decision of this court in *Dr. Suresh Gupta v. Govt. of NCT of Delhi and Anor.* [2004] (6) SCC 422. The bench hearing this appeal doubted the correctness of the view taken in Dr. Suresh Gupta's case and *vide* order dated 9 September 2004 expressed the opinion that the matter called for consideration by a bench of three judges. This is how the case has come up for hearing before this bench.

[7] In *Dr. Suresh Gupta*'s case, the patient, a young man with no history of any heart ailment, was subjected to an operation performed by Dr. Suresh Gupta for nasal deformity. The operation

was neither complicated nor serious. The patient died. On investigation, the cause of death was found to be "not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage". The bench formed an opinion that this act attributed to the doctor, even if accepted to be true, could be described as an act of negligence as there was lack of due care and precaution. But, the court categorically held – "for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable".

[8] The referring bench in its order dated 9 September 2004 has assigned two reasons for their disagreement with the view taken in *Dr. Suresh Gupta*'s case which are as under:

(1) Negligence or recklessness being 'gross' is not a requirement of s. 304A of IPC and if the view taken in *Dr. Suresh Gupta*'s case is to be followed then the word 'gross' shall have to be read into s. 304A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.

(2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of s. 304A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

[9] We have heard the learned counsel for the appellant, the respondent-State and the respondent complainant. As the question of medical negligence arose for consideration, we thought it fit to issue notice to Medical Council of India to assist the court at the time of hearing which it has done. In addition, a registered society – 'People for Better Treatment', Kolkata; Delhi Medical Council, Delhi Medical Association and Indian Medical Association sought for intervention at the hearing as the issue arising for decision is of vital significance for the medical profession. They too have been heard. Mainly, the submissions made by the learned counsel for the parties and the intervenors have centred around two issues: (i) Is there a difference in civil and criminal law on the concept of

negligence?; and (ii) whether a different standard is applicable for recording a finding of negligence when a professional, in particular, a doctor is to be held guilty of negligence?

[10] With the awareness in the society and the people in general gathering consciousness about their rights, actions for damages in tort are on the increase. Not only civil suits are filed, the availability of a forum for grievance redressal under the Consumer Protection Act 1986 having jurisdiction to hear complaints against professionals for 'deficiency in service', which expression is very widely defined in the Act, has given rise to a large number of complaints against professionals, in particular against doctors, being filed by the persons feeling aggrieved. Criminal complaints are being filed against doctors alleging commission of offences punishable under s. 304A or ss. 336/337/338 of the IPC alleging rashness or negligence on the part of the doctors resulting in loss of life or injury (of varying degree) to the patient. The present one is such a case. The order of reference has enabled us to examine the concept of 'negligence', in particular 'professional negligence', and as to when and how it does give rise to an action under the criminal law. We propose to deal with the issues in the interests of settling the law.

Negligence As A Tort

[11] The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well-stated in the *Law of Torts, Ratanlal & Dhirajlal* 24th edn 2002, edited by Justice GP Singh). It is stated (at p. 441-442)

> Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the

said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

[12] According to Charlesworth & Percy on *Negligence* 10th edn, 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (Para 1.01) The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage", that is to say:

1. the existence of a duty to take care, which is owed by the defendant to the complainant;

2. the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

3. damage, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant. (para 1.23)

[13] If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (para 1.24)

Negligence – As A Tort And As A Crime

[14] The term 'negligence' is used for the purpose of fastening the defendant with liability under the Civil Law and, at times, under the Criminal Law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Law. The essential

ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. In *R v. Lawrence* [1981] (1) All ER 974 (HL), Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R v. Caldwell* [1981] (1) All ER 961 (HL) and dealt with the concept of recklessness as constituting *mens rea* in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it."

[15] The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimizing violations, may be motivated by thrill-seeking. These are clearly reckless.

[16] In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews v. Director of Public Prosecutions* [1937] AC 576, stated, "Simple lack of care – such as will constitute civil liability is not

enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established." Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case "A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability." (*Charlesworth & Percy, ibid*, para 1.13)

[17] The fore-quoted statement of law in Andrews has been noted with approval by this Court in *Syad Akbar v. State of Karnataka* [1980] (1) SCC 30. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence, *viz*. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

[18] Law laid down by Straight, J in the case *Reg v. Idu Beg* 1881 (3) All 776, has been held good in cases and noticed in *Bhalchandra Waman Pathe v. State of Maharashtra* [1968] Mh. LJ 423, a three-judge bench decision of this court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

[19] In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.

Negligence By Professionals

[20] In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.* [2001] P.N.L.R. 233, CA, Sedley LJ said that where a profession embraces a range of views as to what is an acceptable standard

of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (*Charlesworth & Percy, ibid,* para 8.03)

[21] Oft'quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair J in *Bolam v. Friern Hospital Management Committee* [1957] (1) WLR 582, 586 in the following words:

> Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill ... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. (*Charlesworth & Percy, ibid,* para 8.02)

[22] The water of *Bolam* test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one. After a review of various authorities Bingham LJ in his speech in *Eckersley v. Binnie* [1988] (18) CLR 1, 79 summarised the *Bolam* test in the following words:

> From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet. (*Charlesworth & Percy, ibid,* Para 8.04)

[23] The degree of skill and care required by a medical practitioner is so stated in *Halsbury's Laws of England* (4th edn, vol. 30, para 35):

> The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.
>
> Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.

Abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth & Percy in their celebrated work on Negligence (*ibid,* para 8.110)

[24] In the opinion of Lord Denning, as expressed in *Hucks v. Cole* [1968] (118) New LJ 469, a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

[25] The decision of House of Lords in *Maynard v. West Midlands Regional Health Authority* [1985] (1) All ER 635 (HL) by a bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the

sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which other four Lords agreed quoted the following words of Lord President (Clyde) in *Hunter v. Hanley* [1955] SLT 213 at 217, observing that the words cannot be bettered:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men – The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care
>
> Lord Scarman added "a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence."
>
> His Lordship further added "that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred."

[26] The classical statement of law in *Bolam*'s case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before Courts in India and applied to as touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out

of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

[27] A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

[28] No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.

[29] *Res ipsa loquitur* is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings,

the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule (See *Syad Kabar v. State of Karnataka* [1980] (1) SCC 30). Incidentally, it may be noted that in *Krishnan and Anr. v. State of Kerala* [1996] (10) SCC 508 the court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned judges constituting the bench has in his concurring opinion merely stated *"res ipsa loquitur"*. Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under s. 304A IPC cannot be decided solely by applying the rule of *res ipsa loquitur*.

[30] A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

[31] If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason-whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society.

[32] The purpose of holding a professional liable for his act or omission, if negligent, is to make the life safer and to eliminate the possibility of recurrence of negligence in future. Human body and medical science both are too complex to be easily understood. To

hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

[33] The subject of negligence in the context of medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work *"Errors, Medicine and the Law"* (Cambridge University Press, 2001). There is a marked tendency to look for a human actor to blame for an untoward event a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of *mens rea* has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. Human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator ie, the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how in real life the doctor functions. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

[34] At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from

more than one person, and the tendency is to blame the last identifiable element in the chain of causation – the person holding the 'smoking gun'.

[35] Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated (See, *Black's Law Dictionary*, 7th edn). Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.

Medical Professionals In Criminal Law

[36] The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm. There are four exceptions listed in the Section which is not necessary in this context to deal with. Section 93 saves from criminality certain communications made in good faith. To these provisions are appended the following illustrations:

> Section 88
>
> A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death and intending in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.
>
> Section 92
>
> Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

Section 93

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

[37] It is interesting to note what Lord Macaulay had himself to say about Indian Penal Code. We are inclined to quote a few excerpts from his speech to the extent relevant for our purpose from *"Speeches and Poems with the Report and Notes on the Indian Penal Code"* by Lord Macaulay (Houghton, Mifflin and Company, published in 1874).

Under the provisions of our Code, this case would be very differently dealt with according to circumstances. If A kills Z by administering abortives to her, with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent, if Z agreed to run the risk, and murder if Z did not so agree. If A causes miscarriage to Z, not intending to cause Z's death, nor thinking it likely that he shall cause Z's death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing of miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z's death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in Z's constitution such as there was no ground whatever to expect, A will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage.

It may be proper for us to offer some arguments in defence of this part of the Code.

It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be in the highest degree barbarous and absurd. (P. 419)

> To punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from every thing which is at all likely to cause death. No fear of punishment can make him do more than this; and therefore, to punish a man who has done this can add nothing to the security of human life. The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. (p.421)
>
> When a person engaged in the commission of an offence causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide.
>
> The arguments and illustrations which we have employed for the purpose of showing that the involuntary causing of death, without either rashness or negligence, ought, under no circumstances, to be punished at all, will, with some modifications, which will readily suggest themselves, serve to show that the involuntary causing of death by rashness or negligence, though always punishable, ought, under no circumstances to be punished as murder. (P.422)

[38] The following statement of law on criminal negligence by reference to surgeons, doctors etc. and unskillful treatment contained in *Roscoe's Law of Evidence* (15th edn) is classic:

> Where a person, acting as a medical man, whether licensed or unlicensed, is so negligent in his treatment of a patient that death results, it is manslaughter if the negligence was so great as to amount to a crime, and whether or not there was such a degree of negligence is a question in each case for the jury. "In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used many epithets, such as 'culpable,' 'criminal', 'gross', 'wicked', 'clear', 'complete.' But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and

showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." (p. 848-849)

whether he be licensed or unlicensed, if he display gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. Where a person who, though not educated as an accoucheur, had been in the habit of acting as a man-midwife, and had unskilfully treated a woman who died in childbirth, was indicted for the murder, L. Ellenborough said that there was no evidence of murder, but the jury might convict of man-slaughter. "To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the [most?] criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct which is essential to make out a case of manslaughter." (p.849)

A review of Indian decisions on criminal negligence

[39] We are inclined to, and we must – as duty bound, take note of some of the relevant decisions of the Privy Council and of this Court. We would like to preface this discussion with the law laid down by the Privy Council in *John Oni Akerele v. The King* [1943] AIR (PC) 72. A duly qualified medical practitioner gave to his patient the injection of Sobita which consisted of sodium bismuth tartrate as given in the British Pharmacopoea. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. The matter reached in appeal before the House of Lords. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are also relevant before us, what their Lordships have held can be summed up as under:

(i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.;

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. ... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion. *The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck*. (emphasis added)

[40] Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

[41] The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra* [1965] (2) SCR 622, while dealing with s. 304A of IPC, the following statement of law by Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap* 4 Bom LR 679, was cited with approval:

> To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the *causa sine qua non*.

[42] K.N. Wanchoo, J (as he then was), speaking for the court, observed that the abovesaid view of the law has been generally followed by High Courts in India and was the correct view to take of the meaning of s. 304A. The same view has been reiterated in *Kishan Chand & Anor. v. The State of Haryana* [1970] (3) SCC 904.

[43] In *Juggankhan v. The State of Madhya Pradesh* [1965] (1) SCR 14, the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The

poisonous contents of the leaf of dhatura, were not satisfactorily established by the prosecution. This court exonerated the accused of the charge under s. 302 IPC. However, on a finding that stramonium and dhatura leaves are poisonous and in no system of medicine, except perhaps Ayurvedic system, the dhatura leaf is given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be a rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. In our opinion, the principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is *prima facie* acting with rashness or negligence.

[44] *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anor.* [1969] (1) SCR 206 was a case under Fatal Accidents Act 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, *viz.*, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The doctor was held guilty of negligence and liability for

damages in civil law. We hasten to add that criminal negligence or liability under criminal law was not an issue before the court as it did not arise and hence was not considered.

[45] In the year 1996, there are 3 reported decisions available. *Indian Medical Association v. V.P. Shantha and Ors.* [1995] (6) SCC 651 is a three-judge bench decision. The principal issue which arose for decision by the court was whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a forum under the Consumer Protection Act 1986. The court dealt with how a 'profession' differs from an 'occupation' especially in the context of performance of duties and hence the occurrence of negligence. The court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (ie, in civil jurisdiction) on the ground of negligence. However, in the observation made in the context of determining professional liability as distinguished from occupational liability, the court has referred to authorities, in particular, Jackson & Powell and have so stated the principles, partly quoted from the authorities:

> In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (See: Jackson & Powell on *Professional Negligence*, 3rd Edn., paras 1-04, 1-05, and 1-56).

[46] In *Poonam Verma v. Ashwin Patel and Ors.* [1996] (4) SCC 332 a doctor registered as medical practitioner and entitled to practice in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the

allopathic medicine to the patient causing the death, his conduct amounted to negligence *per se* actionable in civil law. *Dr. Laxman Balkrishna Joshi*'s case *(supra)* was followed. *Vide* para 16, the test for determining whether there was negligence on the part of a medical practitioner as laid down in *Bolam's* case *(supra)* was cited and approved.

[47] In *Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors.* [1996] (2) SCC 634 the court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady. The doctrine of *res ipsa loquitur* was held applicable 'in a case like this'.

[48] *M/s Spring Meadows Hospital and Anor. v. Harjol Ahluwalia through K.S. Ahluwalia and Anor.* [1998] (4) SCC 39 is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The court referred to the decision in *Whitehouse & Jorden* [1981] (1) All ER 267, and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:

> The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.

[50] In *State of Haryana and Ors. v. Smt. Santra* [2000] (5) SCC 182 also *Bolam's* test has been approved. This case too refers to liability for compensation under civil law for failure of sterilisation operation performed by a surgeon. We are not dealing with that situation in the case before us and, therefore, leave it to be dealt within an appropriate case.

[51] Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors of *"Errors, Medicine and the Law"* (pp. 241-248), (recorded at the end of the book in the chapter titled 'Conclusion') highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote:

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity – in principle – from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward – looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (*ibid*, pp. 242-243)

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (*ibid*, p. 245).

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (*ibid*, p. 246). A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (*ibid*, p. 247). While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (*ibid*, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high – a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (*ibid*, p. 248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (ie, wrongs) calling for punishment on account of being gross or of a very high degree

requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. (*ibid*, p. 248).

[52] Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

Conclusions Summed Up

[53] We sum up our conclusions as under:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at

A the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

B

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which
C he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch
D which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

E (4) The test for determining medical negligence as laid down in *Bolam's* case [1957] (1) WLR 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not
F necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher ie, gross or of a very high degree. Negligence which is neither gross nor of a
G higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in s. 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be
H so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in s. 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something
I or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses

and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.

[54] In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in *Dr. Suresh Gupta*'s case [2004] (6) SCC 422 and re-affirm the same. *Ex abundanti cautela*, we clarify that what we are affirming are the legal principles laid down and the law as stated in *Dr. Suresh Gupta*'s case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from *Errors, Medicine and the Law* by Alan Merry and Alexander McCall Smith which has been cited with approval in *Dr. Suresh Gupta*'s case (noted *vide* para 27 of the report).

Guidelines – Re: Prosecuting Medical Professionals

[55] As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under s. 304A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

[56] We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

[57] Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying *Bolam's* test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Case At Hand

[58] Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case

of the complainant that the accused-appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be – we express no opinion thereon) but the accused appellant cannot be proceeded against under s. 304A IPC on the parameters of *Bolam's* test.

Result

[59] The appeals are allowed. The prosecution of the accused appellant under s. 304A/34 IPC is quashed.

[60] All the interlocutory applications be treated as disposed of.